IN THE

Supreme Court of the United States

October Term, 1967

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JOHN F. DAVIS, CLERK

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on June 26, 1967.

Opinions Below

The memorandum opinion of the District Court for the Eastern District of Missouri, printed at R. 14, is reported at 255 F. Supp. 115. The opinion of the Court of Appeals for the Eighth Circuit issued on June 26, 1967, printed in Appendix B hereto, is reported at 379 F.2d 33.

Jurisdiction

The judgment and opinion of the Court of Appeals for the Eighth Circuit, printed in Appendix B hereto, was entered on June 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

The questions presented are:

1. Whether the refusal of respondents, owners of residential developments, to sell a lot and house, otherwise on the market, to petitioners solely because of their race is prohibited:

   A. Under the Civil Rights Act of 1866, enacted under the Thirteenth Amendment, or

   B. Under the Civil Rights Act of 1866 as re-enacted in 1870 under the Thirteenth and Fourteenth Amendments, or

   C. Under the terms of the Thirteenth and Fourteenth Amendments, aside from any federal statutes?

2. Whether the said discriminatory refusal to sell is unlawful, regardless of the existence or degree of state involvement?

3. Whether the state has sufficiently involved itself in the said discriminatory refusal to sell:

   A. By its various intertwining acts with respondents, such as licensing, zoning, regulating, and other-

wise promoting and assisting the respondents' development, or

B. By its delegation of municipal functions to respondents, or

C. By a combination of these factors

so as to make said refusal unlawful?

Statutes and Constitutional Provisions Involved

The statutes and constitutional provisions involved are:

The Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27, codified in Title 42, U.S.C., Secs. 1981 and 1982.

Sec. 18 of the Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 144, codified in Title 42, U.S.C., Secs. 1981 and 1982.

Sec. 1 of the Enforcement or Anti-Lynching or Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13, codified in Title 42, U.S.C., Sec. 1983.

Sections 1 and 2 of the Thirteenth Amendment to the Constitution.

Sections 1 and 5 of the Fourteenth Amendment to the Constitution.

All these are set forth in Appendix A, *infra*, pp. 1a-15a.

Statement Under Rule 33 (2) (b)

Since the courts below draw into question the constitutionality of the Act of April 9, 1866, 14 Stat. 27, the Act of May 31, 1870, 16 Stat. 144, and the Act of April 20, 1871, 17 Stat. 13, as codified in Title 42, U.S.C. Secs. 1981, 1982 and 1983, Acts of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. Sec. 2403 may be applicable.

No court of the United States as defined by 28 U.S.C. Sec. 451 has, pursuant to 28 U.S.C. Sec. 2403, certified to the Attorney General the fact that the constitutionality of such Acts of Congress have been drawn in question.

Statement

The case was filed in the District Court of the Eastern District of Missouri seeking relief under the Civil Rights Acts of 1866, 1870 and 1871 as revised in 42 U.S.C. Secs. 1981, 1982 and 1983 and under the Thirteenth and Fourteenth Amendments to the Constitution. The District Court had jurisdiction of the cause under 42 U.S.C. Sec. 1983 and 28 U.S.C. Secs. 1331, 1337 and 1343.

Inasmuch as this case arises from the affirmance by the Court of Appeals of the order of the District Court sustaining the respondents' motion to dismiss petitioners' first amended complaint, the facts pleaded by petitioners in their first amended complaint (R. 1-11)* must be taken as true.

* References to the Record on Appeal are designated by R.

Petitioners Joseph Lee Jones and Barbara Jo Jones are husband and wife who, in June of 1965, in consequence of an advertisement in the St. Louis Post-Dispatch, went to a subdivision known as Paddock Woods in St. Louis County, Missouri, in order to consider the purchase of a lot and home. After inspecting the display houses, petitioners decided that a particular type of home was well suited to their personal needs, convenient to their places of employment with agencies of the Government of the United States, and within their financial range (R. 3-4).

Paddock Woods is a subdivision, owned and developed by the Alfred H. Mayer Company, a corporation engaged in the business of developing subdivisions in St. Louis County, including, not only Paddock Woods, but neighboring subdivisions known as Paddock Estates, Paddock Meadows and Wedgewood. Alfred Realty Company is a corporation licensed as a real estate broker by the State of Missouri, which is the exclusive sales agent for the homes in these subdivisions. Alfred H. Mayer, also licensed as a real estate broker by the State of Missouri, owns a controlling interest in and is the managing officer and guiding policy maker of both Alfred H. Mayer Company and Alfred Realty Company. Paddock Country Club, Inc., the other respondent, is a corporation controlled by the other respondents, which operates a golf course for the use of residents of the said "Mayer" subdivisions (R. 1-3; 7-9).

After petitioners Joseph and Barbara Jones had picked out a lot and home in Paddock Woods which they wished to order and purchase, the respondents refused to sell them the house and lot because of the fact that Joseph Jones is a

Negro, and because it is the respondents' general policy not to sell said houses and lots to Negroes (R. 4, 9-10).

The governmental connections of the State of Missouri, its political subdivisions, and their various agencies with respondents and their housing subdivisions here involved are detailed in paragraphs 7 and 8 of the first amended complaint (R. 5-9). The allegations therein show a multiple panoply of state action. Not only are the respondents themselves incorporated and licensed by the State of Missouri, but they also use the services of other state licensees, and of state and municipal offices (including the Building Commission, the Planning Commission, the Recorder of Deeds, the Sewer District, the County Engineer and the Highway Department), and have had delegated to them the right and power to control and regulate the entire subdivision during its construction and, thereafter, by means of restrictive covenants and quasi-taxing power, to assess and lien against residents for community-wide services.[1]

Decisions of the Courts Below

The District Court, upholding a motion to dismiss by respondents, ruled, "It is now well settled that these civil rights statutes are directed toward governmental action" (R. 17). Thus it disposed of the plaintiffs' contention that the Civil Rights Act of 1866 barred discrimination based on race in the sale of housing. The Court then ruled that under the facts alleged there was no state action involved in the refusal to sell, and that this case involves only an individual invasion of the civil rights of the petitioners. The

1. See also, *infra*, pages 21-27.

Court distinguished numerous cases cited by petitioners on the ground that those cases involved the use of public property or facilities, whereas the present case, it held, involves only the refusal to sell private property (R. 32, 38).

Petitioners' argument that the state had in fact clothed the respondents with municipal powers in the building of this subdivision was rejected by the District Court for the reason that, "No governmental power or functions are involved in the sale of private property, a lot in a private subdivision." (R. 27).

The Court of Appeals affirmed the District Court. But in so doing it reflected a reluctance to do so and implied doubt as to the correctness of some of the reasoning of the Court below, especially with respect to the applicability of the Fourteenth Amendment to the Civil Rights Act of 1866. Thus the Court of Appeals, in contrast to the District Court which sought only for "governmental action", phrased the basic issue as "Does Sec. 1982, which is already on the books and which is derived from the Civil Rights Act of 1866, reach discrimination in private subdivision housing?" (379 F.2d 33 at 42-3)

Although the Court recognized that the "state action" doctrine as stated in the Civil Rights Cases, 109 U. S. 3 (1883), had been re-evaluated if not overruled by more recent decisions of the Supreme Court, in particular, *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241 (1964), *Katzenbach* v. *McClung,* 379 U. S. 294 (1964), and *United States* v. *Guest,* 383 U. S. 745 (1966) (379 F.2d 33, at 41-2), it was troubled by the dictum in *Hurd* v. *Hodge,* 334 U. S. 24 (1948), at 31 and 32, which noted that the Civil

Rights Act of 1866 and Fourteenth Amendment were "closely related," which is interpreted as stating that Sec. 1982, although enacted in the first instance under the Thirteenth Amendment and before the proposal and ratification of the Fourteenth Amendment, was still infected by some requirement of state action as a condition of its applicability. The Court finally stated:

> "While we feel that the implications of *Hurd* v. *Hodge* could be regarded as greatly offended and restricted by the sweep of the language in *United States* v. *Guest*, the Supreme Court did not itself express concern about *Hurd* v. *Hodge* and, indeed, did not even cite it. It is not for our court, as an inferior one, to give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts when we are faced with a limiting Supreme Court decision which, so far as we are told directly, remains good law." (379 F.2d 33 at 43)

The Court of Appeals did not take the position that Congress was without power under the Constitution to enact legislation against private discrimination in housing. To the contrary, it said at p. 45:

> "The [legislative] power exists but its exercise is absent. The matter, thus, is one of policy, to be implemented in the customary manner by appropriate statutes directed to the need. If we are wrong in this conclusion the Supreme Court will tell us so and in so doing surely will categorize and limit those of its prior decisions, cited herein, which we feel are restrictive upon us."

Thus it apparently rejected the view that the Fourteenth Amendment's limitation to state action applied to limit any

civil rights laws adopted by Congress. The Court concludes its discussion of this issue simply by stating:

> "* * * the plaintiffs claim a right to purchase a particular piece of property when the owner places it on the market. Is this, too, something which the Fourteenth Amendment goes so far as to reach?" (at p. 44)

The Court of Appeals was also more hesitant than the District Court in rejecting petitioners' contention that the state is substantially involved in respondents' subdivision in that the state allowed respondents to carry out governmental functions in a discriminatory manner. The Court stated:

> "The difficulties with any application of the governmental function argument are that, to a large extent, it relies on state inaction, rather than state action, see *Mulkey* v. *Reitman*, 64 Cal. 2d 529, 413 P.2d 825, 834 (1966), affirmed 387 U.S. 369; it relies upon state assistance which is non-discriminatory in itself; and it necessarily concerns the ever elusive judicial determination, as contrasted with a legislative one, of what is a governmental function." (at p. 44)

The Court of Appeals manifested its uncertainty and its difficulties in affirming the District Court in this way:

> "It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind. It could do so by asserting that Sec. 1982 was, because of its derivation from the Thirteenth Amendment, free of the shackles of state action despite what has been said in *Hurd* v. *Hodge*. It could do so by asserting that, even though Sec. 1982, because of its reenactment, was subject to Fourteenth Amendment limitations, we nevertheless

have, on the accepted facts here, enough to constitute state action in the light of the expanding concept of that term. And it could do so on the ground, suggested in *Guest,* that state action is no longer a factor of limitation and that Congress has acted through Sec. 1982 to reach private discrimination in housing." (at pp. 44-5)

Reasons for Granting the Writ

1. The decision of the Court below dealt with important questions of federal law, which have never been considered and decided by this Court.

The Court of Appeals manifested its doubt and reluctance to limit Sec. 1982 of Title 42 of the U. S. Code, the Civil Rights Act of 1866, by holding it subject to the Fourteenth Amendment requirement of state action. Its sole comment on the claim that the applicability of Sec. 1982 to private discrimination in the sale of real property was "a novel issue, never before presented to the federal courts" was to note that the issue had been discussed by "Justice (now Judge) Edgerton in dissent in *Hurd* v. *Hodge,* 162 F. 2d 233 at 240-41 "when that case was before the District of Columbia Court of Appeals.[2]" And in that dissenting opinion Judge Edgerton had held the section clearly applicable to any federal court action to enforce compliance with a

2. The Court of Appeals below even went so far as to acknowledge that its reading of the language of *Hurd* v. *Hodge* was contradicted in *United States* v. *Morris,* 125 F. 322 (E.D. Ark. 1903), where Judge Trieber "made the historical distinction between the Thirteenth Amendment, on the one hand, and the Fourteenth and Fifteenth on the other, and observed, p. 324 'Congress is, therefore, authorized by the provisions of the Thirteenth Amendment to legislate against acts of individuals, as well as states, in all matters necessary for the protection of the rights granted by that amendment.'" (379 F.2d 33 at 40).

restrictive covenant. Hence, by implication, at least, the Court of Appeals conceded that the question here presented with respect to the applicability of Sec. 1982 of Title 42 to racial discrimination in housing by a private seller was a novel question, so far as this Court is concerned. But it said that it believed itself bound by the dictum of *Hurd* v. *Hodge,* 334 U. S. 24, even though it also clearly indicated that that dictum ignored the plain language of the statute and its purpose as shown by its legislative history.

The fact that petitioners in that case had raised the issue was noted by this Court in a footnote to its decision in *Hurd* (fn. 4, *supra* at 28). But this Court found it unnecessary to deal with the question in that case because it noted that primary reliance was placed by petitioners in *Hurd* v. *Hodge, supra,* on the contention that such governmental action (judicial enforcement of racial restrictive covenants) on the part of the courts of the District of Columbia was forbidden by the due process clause of the Fifth Amendment (*supra* at 28). Then this Court went on to bar judicial enforcement of racial restrictive covenants because it "denies rights intended by Congress to be protected by the Civil Rights Act" and "consequently, the action cannot stand" (*supra* at 34). But the Court then noted:

> "* * * even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States, and as such should be corrected by this Court in the exercise of the supervisory powers over the courts of the District of Columbia. The power of the federal courts to enforce the terms of private agree-

> ments is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where this enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." (at 34-35)

This Court then found that the action taken by the trial court was of such nature that if taken by a state court it would violate the Fourteenth Amendment under *Shelley* v. *Kraemer,* 334 U. S. 1 (1947), and that it would be inconsistent with the public policy of the United States to permit federal courts to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. This Court concluded, "We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action by the courts of the states" (334 U. S. 24 at 35-36). Hence, this Court had no occasion or need to rule in *Hurd* v. *Hodge, supra,* on whether the private action of a would-be seller of real estate in refusing to sell to a would-be Negro purchaser solely because of his race, was in violation of the 1866 Civil Rights Act.

The fact is that *Hurd* v. *Hodge* supports rather than weakens the argument for the constitutional validity of the application of the Civil Rights Act of 1866 to private discrimination in housing. For this Court did say in that decision at 31-32:

> "In considering whether judicial enforcement of restrictive covenants is the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment, for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve."

Apparently the District Court below, and the Court of Appeals read the foregoing as words of limitation. But it is submitted that this was not so intended. Rather, it was intended as showing that, at the very least, the statute in question, now Section 1982 of Title 42, barred governmental action to prevent a sale by a willing white seller to a willing Negro buyer. And the issue raised in the instant case, whether a white seller, refusing to sell to a would-be Negro buyer solely because of the buyer's race, may do so without violating the plain language of the Act and whether there is constitutional authority for federal enforcement of the Act against the white violator, was not dealt with by this Court in any way.

The fact is that the language of the Civil Rights Act of 1866, now Section 1982 of Title 42 of the U. S. Code, becomes unnecessary surplusage if read, as the courts below suggest, as being limited to state action by the Fourteenth Amendment. That section provides simply:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property."

The purchase, lease, sale, holding and conveyance of real and personal property is normally and almost always a

transaction between two or more private persons and the state's role is limited to providing the mechanical machinery, in the case of transfers of real property, for insuring notice to the world of the transfer. The statute talks in terms of the rights of all citizens to inherit, purchase, lease, etc., real and personal property. Since the state, in most cases, has no direct involvement in such purchase or lease, unless the state is itself either the purchaser or seller or lessor or lessee, the statute would have no impact on the right of individual citizens established by it, if the state, as it normally does, plays no role in the transaction.

Clearly what is and was involved in the Civil Rights Act of 1866, and what Congress intended when it enacted this law, was to prevent any and all sellers of property, real or personal, from continuing in effect one of the incidents of slavery, denial to former slaves of the power to purchase, own or convey and sell such property, to participate in the markets of the time and to invoke the sanctions of the law to effectuate such purchases or sales. This right Congress recognized to be an essential one if the former Negro slaves were to be placed on the same footing as white citizens with respect to participation in the life of the general community. So long as the clear intent and purpose of Congress as embodied in this statute continues to be ignored, so long will our country suffer from the vestiges of Negro slavery; the present strife and violence arising out of the existence of the resultant racial ghettos will continue and expand. And until this Court rules that the statute means what it says and is within the constitutional authority of Congress, our country shall continue to be faced with the evils of con-

tinued racial discrimination in housing, racial ghettos which are festering sores and remnants of Negro slavery.

The argument that a purpose of the 1866 Act was to bar racial discrimination in the purchase of real property as a badge of slavery was upheld in *United States* v. *Morris*, 125 F. 322 (E.D. Ark., 1903) where a lower federal court reached a result directly opposite from that reached by the courts below in the instant case. There the court imposed a duty of non-discrimination on the basis of race on a white lessor of land who sought to discriminate against a Negro in the lease thereof by refusing to comply with the lease. But this ruling was not subjected to review by any appellate court. And thus the major question here involved, the constitutionality of the statute as applied to bar discrimination based on race in the sale of housing between private persons has never been ruled on by this Court.

That the question is a novel one meriting the consideration of this Court is implied by the fact that the Court of Appeals did, in its opinion, suggest that the question was one which should be reviewed by this Court. It specifically stated that it could not rule for petitioners because it, "as an inferior court", could not "give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts" when it was, it said, "faced with a limiting Supreme Court decision" which so far as it has been told directly, "remains good law" (379 F.2d 33 at 43).

2. It is submitted that the effect of the decisions below in this case is unduly to limit the applicability, not only of the Fourteenth Amendment which, in Section 1, is limited

to state action but also of the Thirteenth Amendment which is not and never was so limited. Civil Rights Cases, *supra*, at 22.

It is true that this Court has widened the scope of "state action" in the Fourteenth Amendment. But there is not now and never was any need for this widening to occur with respect to the Thirteenth Amendment and statutes enacted to enforce it, such as the statute here involved, since it was always directed against private, not state, action.

The Civil Rights Act of 1866 was enacted before the adoption of the Fourteenth Amendment. Hence it was adopted under the authority of the Thirteenth Amendment, which makes no reference whatsoever to the states or the duties of a state.[3] In the first case to consider this statute, the United States District Court for the Eastern District of Arkansas held:

> "In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment." *United States* v. *Morris, supra,* at 330.

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3. See, Flack, *The Adoption of the Fourteenth Amendment* (1908, Johns Hopkins Press), pp. 21, 23, 27, for the opinions of the law's sponsors and supporters as to its validity under the powers granted Congress by the Thirteenth Amendment, Sec. 2.

The Court went on to state:

> "That the rights to lease and to accept employment as a laborer for hire are fundamental rights, inherent in every free citizen, is indisputable, and a conspiracy by two or more persons to prevent Negro citizens from exercising these rights because they are Negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and laws of the United States, within the meaning of Section 5508, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3712)." *United States* v. *Morris, supra,* at 331.

This Court also recognized in the Civil Rights Cases, *supra,* at 22, that the statute in question was enacted under the Thirteenth Amendment, rather than the Fourteenth. The Court stated:

> "Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."

In view of the foregoing it would appear that the ruling of the courts below is contrary to long established law. But the fact is that it is also contrary to the spirit and impact of a series of recent decisions in which this Court has so largely broadened the sweep of "state action" as to substantially limit the effect of that doctrine in limiting the

federal power to intervene to protect the essential rights of citizens to be free from interference with federally protected civil rights. See, for example *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963); see also *Reitman* v. *Mulkey*, 387 U. S. 369 (1967). Hence, the decision below requires review so that this Court can determine whether it is inconsistent with and contrary to the rulings cited above.

3. Insofar as the decision below fails to take into account the fact that recent decisions of this Court have reflected the view of this Court not only that the Congressional power under Section 5 of the Fourteenth Amendment extends to purely private action which would deny rights guaranteed by that amendment, and, by analogy that Section 2 of the Thirteenth Amendment gives Congress power to enact legislation to implement the rights therein guaranteed by legislation extending to all persons, it should be accepted for review so that it may be reversed.

In *United States* v. *Guest, supra*, six members of this Court, although not speaking for the Court, indicated acceptance of the position that Congress has power under Section 5 of the Fourteenth Amendment, and, therefore, has had, since the adoption of that amendment, power to enact legislation directed against private action interfering with the exercise of rights protected under the amendment. Mr. Justice Stewart, in his opinion for the Court, based his decision on a finding that there was sufficient state action in the defendant's conspiracy to meet the "state action" requirement of the Fourteenth Amendment. He refused

to rule on the question of the impact of Section 5 on Congressional power to adopt legislation against private interference with Fourteenth Amendment rights. Mr. Justice Brennan, concurring in an opinion in which he was joined by Chief Justice Warren and Mr. Justice Douglas, noted that "a majority of the members of the Court express the view today that Section 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under color of state law are implicated in the conspiracy" (86 S. Ct. at 1191). In a footnote, Mr. Justice Brennan explained that his "majority" consisted of the three Justices joining in his opinion plus the three joining in Mr. Justice Clark's opinion, Justices Black and Fortas. These three accepted Mr. Justice Stewart's construction of the indictment as showing state action sufficient to bring about invocation of the Fourteenth Amendment, but also stated their belief that Section 5 empowered Congress to enact laws punishing all conspiracies, with or without state action, that interfere with Fourteenth Amendment rights.[4]

4. See also *Bell* v. *Maryland*, 378 U. S. 226 (1964) where Mr. Justice Goldberg in his concurring opinion, specifically cites the statute in question in this case, as an example of a proper exercise by Congress of the power granted it in Section 5 of the Fourteenth Amendment. At pp. 308-9, he points out that Mr. Justice Bradley's assumption in the Civil Rights Cases that non-discrimination is required in state law, has proven to be altogether wrong, and that his opinion has therefore lost much of its validity. At 309-10 he quotes Mr. Justice Bradley as saying, "Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect as well as the omission to pass laws for protection * * *" and then goes on to conclude that state conduct which might be described as inaction can nevertheless constitute "state action" under the Fourteenth Amendment where the state fails to protect the constitutional rights of some of its citizens, as Missouri has done here to the petitioners-respondents by not requiring the defendant, as a condition of granting it the benefits listed in the complaint, to sell without racial discrimination.

The Court also upheld the powers of Congress under Section 5 of the Fourteenth Amendment in *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), and the exercise of Congressional power under Section 2 of the Fifteenth Amendment, which is equivalent in scope with Section 5 of the Fourteenth Amendment, in *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966).

In the instant case, it is submitted there is sufficient showing of state involvement to meet the "state action" test of the Fourteenth Amendment and, even if Section 1982 were, *arguendo,* subject to the Fourteenth Amendment because of its reenactment in the Civil Rights Act of 1870, it would clearly be a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment to enact legislation directed against conspiracies by private persons, the defendants herein, to deprive petitioners-respondents of their rights under the statute.

But it must also be pointed out that the Thirteenth Amendment has a Section 2 which is almost identical with Section 5 of the Fourteenth Amendment. If the Fourteenth Amendment's Section 5 empowers Congress to take action against private action interfering with or denying rights protected by that amendment, *a fortiori,* the same language in the Thirteenth Amendment empowers Congress to take similar action to bar private action denying rights necessary to implement that amendment. And Section 1982, the Civil Rights Act of 1866, was clearly enacted for that purpose pursuant to Section 2 of the Thirteenth Amendment.

It is clear, therefore, that this Court should now take action, in accordance with the views it expressed in *Guest,*

supra, to accept this case for review, to make it clear that *Guest, supra*, is the law of the land and that Congress had constitutional power under Section 5 of the Fourteenth Amendment and Section 2 of the Thirteenth Amendment to enact legislation such as Section 1982 of Title 42 directed, as it is, on its face, against private action to deny rights under both those amendments.

4. Assuming, *arguendo*, that Section 1982 of Title 42 of the U. S. Code, is not applicable to the instant case, there is nevertheless sufficient "state action" alleged in the complaint here under consideration to require review by this Court to establish that the discriminatory action of the respondents herein is a violation of Fourteenth Amendment rights cognizable by federal courts.

The Court of Appeals below devoted a whole section of its opinion to the expansion of the "state action" concept (379 F.2d 33 at 40). It noted that "State action has also been found in any significant participation or involvement in property." And elsewhere on the same page it said, "we think we may safely observe, without belaboring the cases, that the Supreme Court and other courts in general have broadly viewed the concept of state action. Indeed, by this breadth of view they have ruled against and struck down discriminatory housing practices in a number of instances." Yet, apparently because it viewed the basic issue of the case as being whether Section 1982 reaches discrimination in private subdivision housing (*supra* at 42-3) it failed to examine whether the trial court had ruled correctly when it found that the multiple involvement with and use of state facilities by the respondents in building and selling the subdivision did not involve sufficient state action to call into operation the limitation of the Four-

teenth Amendment against denial of equal protection of the laws. The Court of Appeals did concede (*supra* at 46) in the last sentence of its opinion that "The views entertained by Mr. Justice Douglas, of course, would require the opposing result." At the same time the Court of Appeals spoke as if the sole elements of state power involved in the discriminatory action of the respondents were their being chartered by the state as corporations and their being licensed as real estate brokers. But the complaint, the validity of which is here under consideration, spells out a whole long list of aspects of state power involved in the activities of respondents. These include their use of practitioners of other state licensed businesses, plumbers, electricians, lending institutions, etc. and the use of a state-approved plan and a sales plan under which respondents advertised their houses with a public utility, and authorized government monopoly (R. pp. 5-6), which in all other of its operations would be barred from participating in a racially discriminating scheme. *Boman* v. *Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960).

This Court held in *Marsh* v. *Alabama, supra,* that a company-owned town was subject to the Fourteenth Amendment requirements in the same way that any other town was, and that the owning corporation's property interests did not settle the question. Clearly there comes a point when the alleged rights of a land-owner give way to the reality that in fact he has been constituted a local government, complete with the governmental power to zone. The point is clearly reached in this case. If after completion of Paddock Woods, the Trustees voted to allow no Negroes in the subdivision, the Court would have no trouble holding such a regulation invalid, in the same way that it has held invalid ordinances attempting to set residential zoning pat-

terns. *Buchanan* v. *Warley,* 245 U. S. 60 (1917). How then can respondents, who presently exercise the municipal governmental power in Paddock Woods, be permitted with impunity to exercise powers granted by the state through its inaction as well as action to bar entry of Negroes into the community?

There is another way of characterizing the involvement of the State of Missouri with the activities of respondents which this Court has in recent decisions recognized as an indication of "state action". One must inquire not only what the state is doing for respondents, but also what respondents are doing for the state. For what respondents here are doing for the state is acting in lieu of a local government.

Housing is not the only subject where this Court has found delegation of state functions to be "state action". This Court has held in the election primary cases culminating in *Terry* v. *Adams,* 345 U. S. 461 (1953), that when private citizens are permitted to exercise state governmental functions, they are subject to all constitutional requirements imposed on the states. In fact, in *Terry* v. *Adams, supra,* it was held that the "Jaybird" party, which had no official state recognition whatsoever, and which merely elected a candidate who then appeared on the Democratic primary ballot, could not refuse to allow Negroes to participate in their pre-primary voting, solely because it was performing a governmental function.

Respondents in this case are performing the governmental function of operating a municipality, and they receive the full cooperation and assistance of the State of

Missouri and its political subdivisions and agencies in doing so. To argue that this is mere state inaction is to ignore reality. The fact is that there is state action as well as inaction. It is no accident that state authorities have split off St. Louis County from the City of St. Louis and further split the county into 96 municipalities leaving most of the valuable residentially zoned areas in unincorporated sections where they may be "developed" by companies such as respondents on the basis of excluding Negroes. To say that respondents' acts are merely private acts is to "ignore", as the state claims it is doing, the entire pattern in St. Louis for maintaining and indurating segregation which is based on government cooperation in discrimination with "private" subdevelopers, who as Mr. Justice Douglas points out in *Reitman* v. *Mulkey, supra,* then use the state power to impose patterns of racial discrimination, a misuse of the state's zoning function. A state may not constitutionally permit such developers to act in a way the state itself could not, to impose private racially discriminatory patterns of racial zoning.

If the framers of the Fourteenth Amendment had intended to limit the non-discriminatory action prohibited to states and their agencies and subdivisions by positive discriminatory laws, they would have provided only:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. * * *"

Instead of this the drafters went on to provide:

> "nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If, for example, a policeman stands idly by while a Negro child is beaten while trying to exercise his Fourteenth Amendment right to attend an integrated school, it is clear he has deprived the child of equal protection just as much as if he himself had beaten the child. It is submitted that the decisions of the courts below in this case allow the State of Missouri to deny equal protection to petitioners, aside from all the positive assistance it is giving respondents, merely by putting respondents in the position to bar the Joneses from buying a home they can afford with white neighbors, thus forcing them into segregated housing, and then refusing to do anything about it.

This Court has recognized that a state may act in violation of the Fourteenth Amendment prohibition against racial discrimination by legislative action (*Buchanan* v. *Warley, supra*), by executive action (*Lombard* v. *Louisiana, supra*), by judicial action (*Shelley* v. *Kraemer, supra*, and *Hurd* v. *Hodge, supra*), by action of its school board (*Brown* v. *Board of Education*, 347 U. S. 483 (1954)) or by its inaction in permitting its lessee to discriminate.[5]

5. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961) where the court stated, at 725, 726:

> "As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend upon such a distinction. [Citations omitted.] By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has

Under the lower court's holding in this case, the developer of a community which may well ultimately hold 2,700 families can bar Negroes, when under *Shelley* v. *Kraemer, supra,* a few individual homeowners could not do so. The lower court here holds respondent subdivision developers' action is "private" action. This holding contrasts oddly with *Shelley* v. *Kraemer, supra,* where the same effort made by a few individuals was "state action" simply because they sought to use a court in an attempt to enforce the discrimination.

An important question of interpretation of the rule of "state action", if it still exists, has thus been raised for the first time in this case. Petitioners contend that the Court of Appeals erred in refusing to recognize the existence of state action in the numerous positive acts of state assistance alleged, in the delegating of municipal functions to respondents, and in the combination of these two factors

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so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.

"Because readily applicable formulae may not be fashioned * * * a multitude of relationships might appear to some to fall within the Amendment's embrace, but that * * * can be determined only in the framework of the peculiar facts or circumstances present * * *"

See also *United States* v. *Guest, supra* at 755-6 where Mr. Justice Stewart stated:

"This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation."

to deny constitutionally protected rights. Because of the importance of this question, this Court should review its decision.

5. The legal and constitutional questions involved in this case are of such great importance as to call for final resolution by this Court.

That "housing is a necessary of life" is a truism that Mr. Justice Holmes acknowledged in *Block* v. *Hirsch*, 256 U. S. 135 (1921) at 156. The state has always been concerned and deeply involved in the ownership and alienability of real property. This is reflected in the fact that the government regulates land transfers through recordation, through a specific real property law, and that as long ago as the seventeenth century the Rule Against Perpetuities took final form (see Powell, Richard R., *The Relationship Between Property Rights and Civil Rights*, 15 Hastings Law Journal 140 (1963)). As recently as 1923 the Court took notice of the fact that ownership of real property may carry with it an attribution of the sovereignty of the state. Thus, in *Terrace* v. *Thompson*, 263 U. S. 197 (1923), this Court, upholding California's Alien Land Law—happily since repealed—cited as a basis for so holding, the fact that the state might be endangered if it allowed persons ineligible to become citizens to own land because it was "within the realm of possibility that every foot of land might pass to the ownership or possession of non-citizens" (*supra*, at 224), and thus endanger the authority of the state.

Another special governmental impact of land ownership flows from the fact that allocation of representation in local and national legislative bodies is related to geographical

districts. Hence the creation and perpetuation of patterns of racial exclusion by means of "private" residential racial segregation by sub-developers as is here involved carries with it, as a concomitant, a necessary impact on the racial composition of the population of legislative districts. And this, in turn, can lead to a distrust by segregated racial minorities of our present democratic system which endangers constitutional guarantees of our freedom and equality of treatment under law. We have in recent years seen the fruit of racial segregation in housing, riots in the racial ghettos of many of our major cities, and the essential repudiation of democracy implicit in the pronouncements and behavior of many of the proclaimers of "black power" and their counterparts, the defenders of the segregated *status quo,* the "white power" advocates of race hatred.

The extent of racial discrimination in housing in the United States has been described in detail by the United States Commission on Civil Rights which stated in 1961:

> "In 1959 the Commission found that 'housing . . . seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay.' Today, 2 years later, the situation is not noticeably better.
>
> "Throughout the country large groups of American citizens—mainly Negroes, but other minorities too—are denied an equal opportunity to choose where they will live. Much of the housing market is closed to them for reasons unrelated to their personal worth or ability to pay. New housing, by and large, is available only to whites. And in the restricted market that is open to them, Negroes generally must pay more for equivalent housing than do the favored majority.

> 'The dollar in a dark hand' does not 'have the same purchasing power as a dollar in a white hand.' "[6]

The Commission described the patterns of racial segregation at length and decried the "white noose" surrounding the Negro ghettos in all our major cities. (Report of U. S. Commission on Civil Rights, Part 4, *Housing* (1961), pp. 366-377).

The economic effects of racial segregation in housing are many and harmful to the entire community. Davis McEntire, in his pathfinding study, *Residence and Race* (1960) says at p. 155:

> "Racial differences in the relation of housing equality and space to rent or value can be briefly summarized. As of 1950, non-white households, both renters and owners, obtained a poorer quality of housing than did whites at all levels of rent or value, in all regions of the country. Non-white homeowners had better quality dwellings than renters and approached more closely to the white standard, but a significant differential persisted, nevertheless, in most metropolitan areas and value classes * * *"[7]

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6. Report of the U. S. Commission on Civil Rights, Part 4, *Housing* (1961) at p. 1. See also Report of the President's Committee on Civil Rights, *To Secure These Rights* (1947), pp. 67-70; Myrdal, Gunnar, *An American Dilemma* (1944), pp. 618-27; Commission on Race and Housing, *Where Shall We Live?* (1958), pp. 1-10; Report of the United States Commission on Civil Rights (1959), pp. 336-375; Weaver, *The Negro Ghetto* (1948); Abrams, *Forbidden Neighbors* (1955), pp. 70-81, 137-49, 150-190, 227-243; McEntire, Davis, *Residence and Race* (1960).

7. See also, Commission on Race and Housing, *Where Shall We Live?* (1958), p. 36.

The all-pervasive evil effects of racial discrimination in housing were summarized by the President of the Protestant Council of New York as follows:

> "All of our community institutions reflect the pattern of housing. It is indescribable, the amount of frustration and bitterness, sometimes carefully shielded, but the anger and resentment in these areas can scarcely be overestimated and can hardly be described; and this kind of bitterness is bound to seep, as it has already seeped, but increasingly, into our whole body politic * * * I can think of nothing that is more dangerous to the nation's health, moral health as well as physical health, than the matter of these ghettos."[8]

Since this case arose in the St. Louis area, we cite for the Court, as an example of what is true throughout the country, statistics showing how "private" racial exclusion in segregation and housing have affected the economic status of the Negro residents excluded from access to housing in St. Louis suburbs and confined to ghettos in the City of St. Louis. From 1950 to 1960, the non-white population of St. Louis increased by 62,000 while its white population decreased by 214,377. At the present time Negroes constitute 36% of the population of the City of St. Louis and only 2.7% of adjoining St. Louis County in which Paddock Woods is located. One important effect of this pattern of racial concentration and exclusion is that 22% of the families in the City earn less than $3,000 per year as compared with only 7% in this category in the County. (City of St. Louis, Application to the Department of Housing and Urban Development for a Grant to Plan a Comprehensive

8. U. S. Commission on Civil Rights, 1959 Report, p. 391. See also Report, *supra*, note 6, pp. 380, 386 *et seq.*, Clark, *Prejudce and Your Child* (1955), pp. 39-40.

City Demonstration Proposal, April 26, 1967, p. 7.) The effect of this pattern on the welfare programs of City and County is too apparent to require comment. But the impact of such "private" racial segregation in housing on employment is illustrated by the fact that between 1954 and 1964, the City of St. Louis lost 9,500 jobs, while St. Louis County gained 47,600 jobs. (See, City of St. Louis, Application, *supra.*)

Especially important, in view of this Court's opinion in *Brown* v. *Board of Education, supra,* are the effects which this segregation in housing has upon schools and children.

The Missouri Commission on Human Rights reported in 1961 that no significant advance had occurred in desegregating Missouri's public schools. (Report of U. S. Commission on Civil Rights, *50 States Report,* p. 357.) It recommended:

> "That immediate steps be taken to free housing from racial and religious restrictions, thereby eliminating racial ghettos, which perpetuate racial segregation in the schools in spite of sincere efforts of boards of education to put an end to such segregation." (at 358)

The United States Commission on Civil Rights reported in 1967 that segregation in public schools has increased over the last 15 years, particularly in northern cities. (Report of U. S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967), at 8, 199.)

The racial isolation between city and suburb, made possible by state governmental boundaries and the delegation

of housing functions to private developers, which is the subject matter of this action, is described by the Commission, which concludes:

> "The organization of school districts would not be of special significance if the racial and socio-economic groups they served were fairly representative of the entire metropolitan area. But city and suburban school districts generally serve separate economic, social, and racial groups." (Idem at 200.)

The Commission stated also,

> "In large part, the separation of racial and economic groups between cities and suburbs is attributable to housing policies and practices." (Idem at 20-25.)

going on to describe the means by which segregation is carried out by tacit cooperation of private industry, local government and Federal government.

This full report of the Commission goes on to outline the total failure of compensatory education plans in trying to make "separate" education equal, and the startling evidence that desegregation itself has a profound beneficial effect on the general performance of students (idem at 120-140), concluding among other things that the finding of this Court that segregation "affects the hearts and minds of children in ways unlikely ever to be undone" applies to segregation compelled by housing discrimination as well as to that segregation compelled only by mandatory school segregation laws (idem at 193). Its conclusions (idem at 193) and findings (idem at 199) are very much at the heart of the public policy involved in this case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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